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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
	)	CS Docket No. 97-248
Implementation of the Cable	)	
Television Consumer Protection	)	
and Competition Act of 1992	)	RM No. 9097
	)	
Petition for Rulemaking of	)	
Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	

COMMENTS OF CONSUMERS UNION CONSUMER FEDERATION OF AMERICA AND MEDIA ACCESS PROJECT

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February 2, 1998

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SUMMARY

The cable industry's refusal to provide certain programming to alternative MVPDs is unlawfully impeding the growth of competition and denying viewers their First Amendment right to have access to a multiplicity of voices. Thus, the Commission must act promptly to ensure that its program access rules are strictly enforced.

CU, *et al.* generally support adoption of mechanisms that

- ***expedite the resolution of program access complaints;***
- ***provide disincentives for cable operators to engage in anticompetitive conduct vis a vis programming; and***
- ***broaden enforcement of the program access laws, 47 USC §548.***

These comments address in detail two issues. CU, *et al.* believe that:

- ***the Commission has authority, and should, apply the program access laws to programming that is delivered terrestrially; and***
- ***the Commission should assess vastly increased forfeitures and damages for program access violations.***

The plain language of Section 628(b) gives the Commission express authority to apply its program access rules to programming that was once satellite-delivered, but is now delivered terrestrially. When vertically integrated programmers unfairly refuse to sell programming that was once "satellite cable programming" to competitors, their actions fall squarely under Section 628(b).

In any event, the Commission has broad ancillary authority to extend the program access rules to cover terrestrially-delivered programming. Under Sections 4(i) and 303(r) of the Communications Act, the Commission may take any action "necessary" to enforce Section 628, so long as those actions are not otherwise expressly prohibited. *E.g., U.S. v. Southwestern Cable*

Co., 392 U.S. 157, 177-78 (1968). *See also, CBS Inc. v. FCC*, 453 U.S. 367 (1981); *U.S v. Storer Broadcasting Co.*, 351 U.S. 192, 203-204 (1956); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943); *Mt. Mansfield Television, Inc. v. FCC,* 442 F.2d 480, 481-87 (2d Cir. 1971); *Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966); *Metropolitan Broadcasting Co. v. FCC,* 289 F. 2d 874, 876 (D.C. Cir. 1961).

Broadened enforcement of Section 628 is "necessary" to ensure that vertically integrated programmers do not undermine the purposes of Section 628, *i.e.*, "increasing competition and diversity in the multichannel programming market," and "increasing the availability of satellite cable programming...to persons in rural and other areas...." 47 USC §548(a). Whether alteration of programming to terrestrial delivery has either the "purpose" or "effect" of denying it to competitors is irrelevant to achieving the purposes of the law, and to ensuring viewer choice.

Regardless of where the Commission finds authority to extend the program access rules to cover terrestrial delivery of programming, it should act promptly to do so. The one complaint now before the Commission alleging that a vertically integrated programmer evaded the program access rules by altering its delivery mechanism is just the tip of a Titanic-sized iceberg. Changes in technology and the increasing regional "clustering" of cable systems will give large vertically integrated MSOs the resources, and the incentive to transmit their programming terrestrially. In addition, increasing concentration on the national level and the growth in joint ventures between large cable MSOs and non-vertically integrated programmers threaten to deny even more programming to competitive MVPDs.

In addition to broadening its enforcement of Section 628, the Commission must also seek to deter vertically integrated programmers from engaging in program access violations, or, at

the very least, provide incentives for such programmers to negotiate in good faith with competitive MDUs where there are program access concerns. Current Commission practice, which includes only the imposition of minuscule forfeitures, provides little incentive for mega-media conglomerates to avoid anticompetitive behavior.

There are several ways for the Commission to achieve the goal of deterrence. First, it should raise its daily baseline forfeiture for program access violations to the statutory maximum of $25,000. Second, it should define a "cable television operator" liable for forfeitures under 47 USC §503 as one cable system or franchisee. Thus, each cable system run by a large MSO would be subject to the daily forfeiture amount.

The Commission should also exercise its authority and impose damages for program access violations. The damages should run from the date of actual notice, *i.e.,* 10 days prior to the filing of a program access complaint. Damages should be calculated according to the type of complaint. For example, for those complaints alleging price discrimination but not involving a refusal to sell programming, the measure of damages should be the difference between the rate the complainant was charged and the rate it should have been charged. For complaints involving a refusal to sell programming, the Commission should consider calculating damages based upon the cost per subscriber of programming multiplied both by the number of the competing MVPD's subscribers, and by the number of days of the program access violation.

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In the Matter of:	)	
	)	CS Docket No. 97-248
Implementation of the Cable Television	)	
Consumer Protection and Competition Act of 1992	)	
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc.	)	
Regarding Development of Competition	)	

COMMENTS OF CONSUMERS UNION
CONSUMER FEDERATION OF AMERICA
AND MEDIA ACCESS PROJECT

Consumers Union, Consumer Federation of America and Media Access Project (CU, *et al.*) respectfully submit these comments to the Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC No. 97-415 (released December 18, 1997) (*"NOPR"*) in the above referenced docket.

The cable industry's refusal to provide certain programming to alternative MVPDs is unlawfully impeding the growth of competition and denying viewers their First Amendment right to have access to a multiplicity of voices. Thus, prompt remedial action is needed.

CU, *et al.* generally support adoption of mechanisms that

- ***expedite the resolution of program access complaints;***
- ***provide disincentives for cable operators to engage in anticompetitive conduct vis a vis programming; and***
- ***broaden enforcement of the program access laws, 47 USC §548.***

These comments address in detail two issues. CU, *et al.* believe that:

- ***the Commission has authority, and should, apply the program access laws to programming that is delivered terrestrially; and***
- ***the Commission should assess vastly increased forfeitures and damages for program access violations.***

INTRODUCTION

The Commission's review of Section 628 of the Communications Act could not have come at a more appropriate moment. Commission and statutory policy assumes that competition will enable deregulation of multichannel video programming. But the expected competition has not materialized as quickly as hoped. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC No. 97-243 (released January 13, 1998) at ¶¶7-8, 11 (*"1997 Competition Report"*) ("The cable industry's large share of the MVPD audience is a cause for concern, in large part, only to the extent it reflects an inability of consumers to switch to some comparable source of video programming.") And the Commission has recognized that this is in some part because of the difficulties competitive multichannel video providers (MVPDs) have obtaining access to programming. *Id.* at ¶230. Increasing regional "clustering" and national consolidation in the cable industry threaten to retard increased competition to an even greater extent.

While much of the debate so far in this matter has focused on the battle between competing MVPDs, by far the biggest loser in the program access wars is the public. In the absence of effective competition in the MVPD market, viewers have paid dearly as cable rates have skyrocketed. *Id.* at ¶7,11 (8.5% increase in cable rates from July 1, 1996 to July 1, 1997). *See generally, Petition to Update Cable Television Regulations and Freeze Existing Cable Television Rates*, filed by Consumers Union and Consumer Federation of America, September 23, 1997 (*"CU/CFA Rate Freeze Petition"*). Moreover, the resulting lack of choice has denied viewers their First Amendment right to have access to a variety of information from diverse sources. *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2470 (1994); *Associated Press v. United*

States, 326 U.S. 1, 20 (1945).

The Commission has often expressed its preference for promoting competition in the MVPD market over price regulation. *E.g., 1997 Competition Report* at ¶10 ("Initiatives such as these are critical to the development of a competitive marketplace that, one day, will render superfluous cable rate regulation and other rules"). This docket gives the Commission the opportunity to remove one of the largest obstacles to achieving that goal. These changes, at a minimum, must include application of Section 628 to terrestrially-delivered programming, and vastly increased forfeitures and damages for violations of the program access rules.

I. THE COMMISSION CAN, AND SHOULD, EXTEND THE PROGRAM ACCESS RULES TO COVER TERRESTRIALLY-DELIVERED PROGRAMMING.

The Commission seeks comment on whether it has the statutory authority to extend its program access rules to cover terrestrially-delivered programming that was previously delivered *via* satellite. *NOPR* at 51. It also seeks comment on whether such action is "appropriate." *Id.*

CU, *et al.* believe that the plain language of Section 628 (b) gives the Commission express authority to apply its program access rules where a vertically integrated programmer has changed its program delivery mechanism from satellite to terrestrial, and the result of such action is to "hinder" or "prevent" unfairly a competing MVPD from obtaining that programming. Even were that not so, the Commission undoubtedly has broad authority to so extend program access authority in the absence of any express statutory prohibition. *See* 47 USC §154(i); 47 USC §303(r); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996); *New England Telephone and Telegraph v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987).

Whether the Commission finds express or ancillary jurisdiction here, there is good reason for the Commission to extend its program access rules at this time. Changes in technology and

the increasing regionalization of cable systems will give large vertically integrated MSOs the resources, and the incentive, to transmit their programming terrestrially. Moreover, increasing concentration on the national level and the growth in joint ventures between large cable MSOs and non-vertically integrated programmers threaten to deny even more programming to competitive MVPDs. The Commission already has before it one program access complaint based on terrestrial delivery, but the practice will spread absent prompt Commission action.

A. The Plain Language of Section 628 Expressly Authorizes the Commission to Apply the Program Access Rules to Terrestrially-Delivered Programming That was Previously Delivered Via Satellite.

The Commission suggests that the plain language of Section 628 does not apply to vertically integrated programmers that alter their distribution method from satellite distribution to terrestrial distribution, even if the "purpose or effect" of that action is to deny a competing MVPD that programming. *NOPR* at ¶51. To the contrary, however, the plain language of Section 628 does give the Commission authority to prohibit a cable operator from unfairly competing by altering its programming if the "purpose or effect" of that action would be to deny programming to a competing MVPD.

Section 628(b) states that

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, ***the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming*** or satellite broadcast programming to subscribers or consumers.

47 USC §548(b) [Emphasis added].

Thus, the alteration of satellite-delivered programming to terrestrial delivery violates Section 628(b) when that alteration has the "purpose or effect" of "hinder[ing]" or "prevent[ing]"

a competing MVPD from providing what it was able to provide previously, that is, "satellite cable programming."

The recent program access complaint of DIRECTV against Comcast provides an instructive example of how Section 628(b) already applies to terrestrially-delivered programming. *See* Complaint of DIRECTV in re: *DIRECTV v. Comcast Sportsnet*, filed September 23, 1997. For over two years, DIRECTV provided Comcast's Philadelphia-based regional sports programming, obtained *via* satellite. After converting its delivery system to terrestrial fiber line, Comcast refused to sell the programming to DIRECTV. Thus, Comcast's refusal to sell the programming permitted by the alteration in program delivery prevented DIRECTV from providing its viewers the very same "satellite cable programming" they had received in the past.[1]

B. The Commission Has Ancillary Authority to Extend the Program Access Rules to Cover Terrestrially-Delivered Programming.

Even if it decides that Section 628(b) does not afford express authority to apply its program access rules to terrestrially-delivered programming, the Commission has ample ancillary jurisdiction under Sections 4(i) and 303(r) of the Communications Act to do so.

Section 4(i) states that

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions.

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[1]Comcast has asserted hypertechnical claims that the program service has been reformulated, and thus is a "new" service never carried by satellite. *See* Comcast Answer in re: *DIRECTV v. Comcast SportsNet* at 15. The Commission should establish principles for assessing such pretextual claims. Essentially identical programming cannot be shielded by such mechanisms. However, should the Commission choose to exercise its ancillary jurisdiction to extend the program access rules to terrestrially-delivered programming, whether or not that programming was previously delivered *via* satellite becomes irrelevant.

47 USC §154(i).

Similarly, Section 303(r) gives the Commission power to

> [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act....

47 USC §303(r).

There is a large and established body of case law defining the expansive powers of these provisions. *E.g., U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968). *See also, CBS Inc. v. FCC*, 453 U.S. 367 (1981); *U.S v. Storer Broadcasting Co.*, 351 U.S. 192, 203-204 (1956); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943); *Mt. Mansfield Television, Inc. v. FCC,* 442 F.2d 480, 481-87 (2d Cir. 1971); *Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282, 284 (D.C. Cir. 1966); *Metropolitan Broadcasting Co. v. FCC,* 289 F. 2d 874, 876 (D.C. Cir. 1961). Extending the program access rules to terrestrial delivery is not "inconsistent" with existing laws; to the contrary, it is quite "necessary" to the achieve the purpose of Section 628. Section 628(a) states that

> [t]he purpose of this section is to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

47 USC §548(a).

Terrestrial delivery of programming that has the effect of denying competitors that programming decreases "competition and diversity in the multichannel video programming market," and decreases "the availability of satellite cable programming...to persons in rural and other

areas...." *Id.*[2]

That Congress was silent on the matter of terrestrial delivery of programming in the plain language and legislative history of the 1992 Cable Act does not strip the Commission of jurisdiction to regulate it as "necessary" to implement it. *E.g., Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996 (The *expressio unius* maxim - that the expression of one is the exclusion of others - "'has little force in the administrative setting' where [the Court] defer[s] to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue'"); *New England Telephone and Telegraph v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987).[3] In the absence of an express statutory prohibition on such action, the Commission should exercise its jurisdiction.

C. There is Good Reason for the Commission to Extend its Program Access Rules to Terrestrially-Delivered Programming.

It is inevitable that some parties commenting in this proceeding will urge that there is currently no need to extend the program access rules to terrestrial delivery. They will argue that the program access complaint filed by DIRECTV is an aberration, and that the Commission should not propose a solution without a problem.

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[2]Additional authority can be derived from the Commission's rate regulation powers. Extending the program access rules are quite "necessary" to enforce 47 USC §543, which has the purpose of keeping prices for cable service and equipment affordable. When competing MVPDs are denied programming, they are unable to compete effectively with the far more pervasive cable operators. *See 1997 Competition Report* at ¶7 (cable operators control 87% of the MVPD market). The cable operators, in turn, are then able to use their monopoly position to raise cable prices. Indeed, that is what happened over the twelve month period from July 1, 1996-July 1, 1997. *Id.*

[3]Congress was silent on terrestrial delivery of programming because, for economic and other reasons, that delivery system was not widely used in 1992.

But the DIRECTV complaint is only just the tip of what promises to be a Titanic sized iceberg for competing MVPDs. As the Commission recognized only recently

> improved technology and lower costs are improving the efficiency of terrestrial distribution of programming, particularly over fiber optic facilities. As a result, it appears that it may become possible for a vertically integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming

1997 Competition Report at ¶231 quoting *1996 Competition Report*, 12 FCC Rcd 4358, 4435 (1997).

In addition, as discussed below, other trends in the cable industry not only will make terrestrial delivery more attractive, they otherwise threaten to stifle competition in the MVPD market, and therefore necessitate stricter enforcement of the program access rules.

Establishing clear policies to address unmistakable national trends is vastly preferable here to lawmaking by adjudication. Waiting for complaints to be filed, poring through essentially similar, but potentially complicated factual circumstances in each case is a slow and resource intensive process.

1. Regional Clustering

As the Commission has recognized, there is increasing regional"clustering" of cable systems, whereby "MSOs consolidate system ownership within separate geographical regions,...." *1997 Competition Report* at ¶140. Clustering, the Commission states

> provides mechanisms to reduce costs and to improve operating and management efficiencies, to eliminate system redundancies and to attract more advertising.****[R]egional clustering may also enhance MSO's ability to compete successfully in the future with LECs and major electric utilities as providers of data transmission and local telephone services. Commenters suggest that clustered systems increase cable operators' ability to be more competitive across a range of markets and technologies (*e.g.*, video programming delivery, telecommunications, Internet access services) as "full service providers" in these markets.

1997 Competition Report at ¶140.

The economies of scale that result from such clustering will provide added resources that will make use of fiber optic and microwave delivery of programming more economically feasible. Fiber delivery of programming also makes greater economic sense when clustered MSOs provide "local" and/or "regional" programming that is seen only in a discreet region of the country. *See* January 23, 1998 Letter from William E. Kennard to Hon. W.J. Tauzin at 6 ("There has been a trend toward greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available. These interconnections are used in some instances for the distribution of local or regional advertising sales.") Moreover, to the extent that cable operators will seek to engage in other services (Internet, telephony) that use fiber optic and other terrestrial technology, they will increasingly rely on those technologies for all of their services, including video programming delivery.[4]

2. *National Concentration and Joint Ventures with Non-Affiliated Programmers*

Moreover, increasing concentration of ownership in the national cable market, *1997 Competition Report* at ¶¶ 149-156, and the increase in joint ventures between non-vertically integrated programmers and cable MSOs, *id.* at ¶¶233-236, have the effect of denying even more programming to competitive MVPDs. *See CU/CFA Rate Freeze Petition* at 10-17 (calling on the Commission to reevaluate its implementation of the 1992 Cable Act in light of increasing concentration in the cable TV marketplace.) As the Commission recently recognized

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[4]Beyond the fact that clustering makes terrestrial delivery of programming more attractive, the Commission has recognized its anticompetitive effects. 1997 Report at ¶141. Clustering "eliminates operators of adjacent cable systems as potential overbuilders." *Id.*

> if a cable MSO controlled a large fraction of multichannel video programming distribution capacity or subscribers on a national level, it might be able to control the development of new programming networks, influence the content and limit the diversity on existing networks, and ***might be able to exercise buying power that would restrict the upstream national market for the provision of programming networks to all MVPDs.***

1997 Competition Report at ¶149. [Emphasis added.]

What the Commission fears is already coming true. Because "successful launch of a new mass market, advertiser supported, national programming network...requires that the new channel be available to at least fifteen to twenty million households," *1997 Competition Report* at ¶155, and competitive MVPDs do not yet have that kind of viewership, non-vertically integrated programmers have rushed into the arms of the largest cable MSOs. *See id.* at ¶¶ 233-236. These arrangements often involve exclusive contracts which are currently, and will remain in the near future, beyond the reach of the program access rules. *NOPR* at ¶36 (Commission denies request to examine whether program access rules should apply to non-vertically integrated programmers).

D. It is Irrelevant Whether Alteration of Programming Has the "Purpose" or "Effect" of Evading the Program Access Rules.

The Commission asks whether

> programming that has been moved from satellite to terrestrial delivery can or should be subject to program access requirements based on the effect, rather than the purpose, of the programmer's action.

NOPR at ¶22.

The answer to the Commission's question is a resounding "yes." From a viewer's perspective, what the programmer's motives are irrelevant. The result, or "effect," is the same - competing MVPDs are weakened, viewers have fewer choices, and incumbent MVPDs are able to increase their monopoly power and ability to raise prices.

Moreover, to the extent that the Commission agrees with CU *et al.*'s plain language argu-

ment, discussed above, Section 628(b) does not distinguish between the "purpose or effect" of a programmer's unfair conduct. They are both actionable. But even if the Commission relies on its ancillary jurisdiction to promulgate rules that are "necessary" for the enforcement of Section 628, it still should look to the statute for instruction on this issue.

II. THE COMMISSION SHOULD DETER PROGRAM ACCESS VIOLATIONS BY IMPOSING INCREASED FORFEITURES AND PROVIDING FOR RECOVERY OF DAMAGES.

The Commission seeks comment as to whether the Commission's forfeiture authority is adequate to deter program access violations, or whether it should also award damages. *NOPR* at ¶45. It also asks for comment on how such damages should be calculated. *Id.* at ¶46-47.

CU, *et al.* agree with the Commission that it has the authority to levy both forfeitures and damages for program access violations. *NOPR* at ¶45. While it declined to exercise its authority to levy damages when it first created its program access rules, *Reconsideration Order*, 10 FCC Rcd 1902, 1911 (1994), vast changes in the MVPD market and cable industry practices warrant the Commission revisiting this issue.

Given the increase in program access complaints and concerns over availability of programming, it appears that current Commission policies are inadequate to deter program access violations, or even to encourage vertically integrated programmers to negotiate with a competitive MVPD to resolve a program access dispute. Not only is the daily minimum forfeiture too low, but even the statutory maximum - $250,000 - is too small to provide an adequate deterrent to huge media conglomerates. *See* 47 USC §503(b)(2)(A). Thus, the Commission must both raise its daily penalties ***and*** award damages. Damages should be calculated beginning from 10 days prior to the filing of a program access complaint, and should be decided on a case-by case basis,

taking into account different factors depending on the type of complaint.

A. The Commission Should Raise its Baseline Daily Forfeiture for Program Access Violations.

The Commission notes that its current baseline forfeiture for program access complaints is $7500 per day, and asks whether that amount is adequate. *NOPR* at ¶47.

Given the size and power of the vertically integrated cable MSOs, the possibility of a $7500 per day penalty for a program access violation is no deterrent to anticompetitive behavior. Nor does it provide an incentive for these companies to negotiate in good faith where there is a program access dispute. Three of the largest cable MSOs, for example, have revenues of over $4 billion - Time Warner ($20.9 billion), TCI ($8 billion), Comcast ($4 billion). "Top 25 Media Groups," *Broadcasting & Cable*, July 7, 1997 at 22. To make matters worse, Section 503 of the Communications Act sets a $250,000 maximum for forfeitures levied on a "cable television operator." 47 USC §503 (b)(2)(A). Faced with such minuscule penalties, there is little risk for multi-billion dollar cable companies to withhold programming from its competitors.

There are two ways for the Commission to make its forfeiture authority more meaningful. First, it should raise its baseline daily forfeiture for program access violations to the maximum allowed by Section 503, *i.e.*, $25,000. *Id.* Second, it should interpret the term "cable television operator" as applying to a single cable television system or franchise. Thus, if a vertically integrated MSO is the franchisee for 100 cable systems, the daily forfeitures would increase to

$2,500,000.[5]

B. Any Compensatory Damages the Commission May Choose to Impose Should Run From 10 Days Before the Filing Date of a Complaint, and Should Be Calculated Based on the Type of Complaint.

The Commission seeks comment on the time from which any damages it may impose should be levied *NOPR* at ¶46, and also how those damages should be calculated. *Id.* at ¶47.

1. Date From Which Damages Should Run

CU, *et al.* believe that damages for program access violations should run from the point at which the cable operators are placed on actual notice, *i.e.*, 10 days before the day a competing MVPD files a program access complaint. Because the Commission's rules do not set out a time limit for competing MVPDs to file complaints after they have filed their notice of intent to file, *see* 47 CFR §76.1003(a), a competitor could delay the filing of its actual complaint until long after it files its notice of intent to do so. Thus, it would be inequitable to calculate the damages from the time the notice of intent is filed.[6] However, the rules do compel competitors to wait 10 days before filing a complaint to permit a response from the vertically-integrated programmer. *Id.* Thus, the ten days a complainant must wait should be added for the calculation of damages. Calculating the damages in this manner will encourage competing MVPDs to file complaints expe-

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[5]Should the Commission choose not to interpret Section 503 in this manner, it should ask Congress to revise Section 503 to allow for vastly increased forfeitures that will serve as deterrents to anticompetitive behavior by today's mega-media companies. The law was last revised in 1992, prior to the massive consolidation that has taken place in the industry as a result of increased deregulation and the Telecommunications Act of 1996. The outdated maximums set over 5 years ago render the law virtually meaningless.

[6]Similarly, because a competitor could delay filing a program access complaint long after the violation of the rules first occurs, it would not be equitable to calculate damages from that date. *See* NOPR at ¶46 (seeking comment on whether damages should be levied from the day the program access violation first occurred).

ditiously, which is consistent with their desire to have expedited Commission resolution of program access complaints.

2. Calculation of Damages

The Commission asks whether is should set a "standard" calculation of damages or whether it should determine damages on a case-by-case basis. *See* NOPR at ¶45.

CU, *et al.* believe that the Commission should employ each mechanism, since they identify two different kinds of harm. The damages to a competing MVPD stemming from a vertically-integrated programmer's refusal to sell programming will be different from the damages to another who has paid more than other MVPDs for the same programming, but still has been able to provide it to its subscribers. Therefore, the Commission should consider different factors depending on the type of complaint before it.

For example, in price discrimination cases, the Commission should assess damages based on the difference between the rate the complainant was charged and the rate the complainant should have been charged in the case of price discrimination. But in those cases, involving price discrimination or otherwise, where a vertically integrated programmer has refused to sell programming to a competing MVPD, the calculation of damages is not so simple. While the Commission suggests "lost profits," *NOPR* at ¶47, it is almost impossible to determine how much profit is lost if one channel among 100 or so is denied.

This is where the Commission could set a "standard" calculation. One possibility is to assess damages based upon the cost per subscriber that the programmer charges competing MVPDs for the particular program at issue. For example, if a programmer charges competing MVPDs one dollar per subscriber per month for program A, refuses to sell that programming

to another competing MVPD with 100,000 subscribers for three months (running from 10 days before a complaint is filed), then the damages would equal $300,000. For a competitive MVPD with hundreds of thousands or even millions of customers, this kind of calculation might serve as an adequate deterrent to anticompetitive conduct by even the largest MSOs.

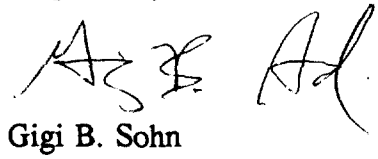
CONCLUSION

The Commission should take this opportunity to put some muscle behind its calls for competition in the MVPD market. As the Commission recognizes, the program access rules were "a necessary factor in the development" of alternative MVPDs such as DBS and MMDS. *1997 Competition Report* at ¶230. But a huge loophole and the dearth of adequate incentives for vertically integrated programmers to abide by the rules threaten to undermine this progress, to the detriment of the American public.

The Commission should take whatever steps are necessary to expedite the process for resolving program access complaints. Most importantly, it should 1) apply the program access law and rules to programming that is delivered terrestrially; 2) increase daily forfeitures for program access violations to the statutory maximum and 3) exercise its authority and impose dam-

ages for program access violations in accordance with the guidelines set out in these comments.

Respectfully submitted,



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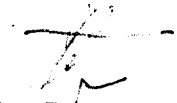

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